IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3836 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ABBAS HASAM BHAYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 3836 of 2002

MR MM TIRMIZI for Petitioner No. 1

MR MA BUKHARI, LD.APP for Respondent No. 1

MR MAHESH BHAVSAR for Respondent No. 2-3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 21/12/2002

ORAL JUDGEMENT

#. This is a petition under Section 482 of the Criminal Procedure Code, 1973, for quashing a FIR registered as Crime Register No.I-11/2001 before Salaya Police Station in Jamnagar District for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code. It may be incidently noted that on completion of investigation in the said matter, the Investigating

Officer has submitted charge-sheet before the learned JMFC at Khambhaliya in Jamnagar District and the case has been registered as Criminal Case No.701/2001 before the said Court.

#. The 2nd respondent, herein, filed the aforesaid FIR on 19.5.2001 alleging that the present petitioner has kidnapped his minor daughter, Sherbanu - respondent No.3, herein, under a false pretext that he would marry her and thereby committed offence punishable under Sections 363 and 366 of I.P.C. During the course of the investigation, it was noticed that the petitioner had physical relations with respondent No.3 and, therefore, the offence under Section 376 of the Indian Penal Code was added subsequently and, therefore, charge-sheet has been filed for the aforesaid offences.

#. The petitioner has contended here that false case was presented in the said FIR. It is also contended that the petitioner actually wanted to marry the 3rd respondent and they both have married also. It is also stated that a child has also borne out of the said wedlock and the wedlock is still intact. It is, therefore, contended that no offence is made out and, therefore, the aforesaid FIR resulting in the aforesaid Criminal Case may be quashed and set aside.

#. Rule was issued at the first instance and interim relief was also granted at the first instance. In response to the service of rule Mr.M.A. Bukhari, learned APP appears for the State and Mr.M.M.Bhavsar, learned advocate appears for other two respondents. I have heard the learned advocate for the petitioner, learned APP for the State and learned advocate for contesting respondent Nos.2 and 3.

#. It is not much in dispute that the alleged offence is said to have taken place on 19.5.2001. It is also not much in dispute that according to the investigation, the 3rd respondent was borne in the middle time of 1985 and, therefore, the 3rd respondent had completed 16 years of age on the date on which the offence is said to have been committed.

#. Learned APP has taken me though the statement of respondent No.3 recorded by the Police Investigating Officer during the course of the investigation wherein it has been clearly stated by her that she actually married the petitioner voluntarily and this fact clearly shows that it was her willingness and consent to have physical relation with the petitioner when she was above the age

of 16 years. Since the said relation took place on account of consent and willingness of the 3rd respondent after their marriage, no offence can be said to have been made out with respect to an offence punishable under Section 376 of the Indian Penal Code.

#. So far as the offences punishable under Sections-363 and 366 are concerned, it is very clear that before it could be alleged that the aforesaid offences have been committed by the present petitioner, it would be necessary for the prosecution to allege and prove that the petitioner had kidnapped or abducted 3rd respondent with an intent that she may be compelled, or knowing that it is likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to have illicit intercourse, or knowing that it is likely that she will be forced or seduced to have illicit intercourse.

#. This means that before the offence punishable under Section 366 of the Indian Penal Code can be said to have been committed by the petitioner, the above ingredients are required to be alleged and proved.

#. From the police papers in general and from the statement of the 3rd respondent - the alleged victim of the case in particular, it is very clear that she voluntarily left the house of the 2nd respondent and had voluntarily gone to stay with the petitioner. Actually they have married and a child has also borne out of the said wedlock. In view of the said position, the ingredient required to be proved for an offence punishable under Section 366 of IPC has not been proved even at conclusion of investigation even prima facie. It would then not be open to the trial Court to proceed ahead with the trial against the petitioner with respect to the said offence.

##. Same way, when the petitioner and respondent No.3 have married voluntarily and when it is clear that the petitioner had not kidnapped or abducted the 3rd respondent for illicit purpose, even the offence punishable under Section 363 IPC also cannot be said to have been made out even prima facie on the face of the record.

##. Mr.M.M.Bhavsar, learned advocate appearing for respondent Nos.2 and 3 is also clear on the point and he clearly agrees that having regard to the facts and circumstances of the case, and also to the circumstance that the petitioner and respondent No.3 have married and

they are living a happy married life, no offence is made out against the petitioner. Even the learned APP also states that looking to the papers attached to the charge-sheet, no offence as alleged in the charge-sheet or in the FIR is made out.

##. When the petitioner and respondent No.3 have married and when they have a child and when they are living a happy married life, it would be in the fitness of things to exercise inherent powers and jurisdiction vested in this Court by Section 482 of the said Code for quashing the FIR and charge-sheet which resulted in a criminal case.

##. For the foregoing reasons, this petition is allowed. The FIR being Crime Register No.I-11/2001 before Salaya Police Station in Jamnagar District, and Criminal Case No.701/2001 pending before the learned JMFC, Khambhaliya in Jamnagar District, are ordered to be quashed and set aside. Rule is made absolute. D.S. is permitted.

(D.P.BUCH, J.)

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